

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY LAMONT TURNER,

Defendant-Appellant.

UNPUBLISHED

June 8, 1999

No. 204124

Genesee Circuit Court

LC No. 90-043073 FC

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

A jury convicted defendant of one count of kidnapping, MCL 750.349; MSA 28.581, two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was acquitted on a second kidnapping count. Defendant, who was sixteen years old when he committed the offenses, was sentenced as an adult to fifteen to thirty years' imprisonment for each of the kidnapping and CSC convictions, and to five to ten years' imprisonment for the assault conviction. He appeals his convictions and sentence by delayed leave granted from a post-conviction order denying his motion for relief from judgment under MCR 6.500 *et. seq.* We affirm.

Defendant first contends that he was denied his right to a fair trial due to several instances of prosecutorial misconduct. Defendant did not object to any of the instances of misconduct alleged on appeal. Because a curative instruction could have eliminated the prejudicial effect of the prosecutor's questions and comments and the failure to consider the issue will not result in a miscarriage of justice, the claim is not preserved for appellate review. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

In any event, the argument is without merit. The test for prosecutorial misconduct is whether the conduct complained of denied the defendant a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Here, the reference to prosecution witness Jermaine Hammond's promise of truthfulness pursuant to his plea agreement did not hint that the prosecutor had some special knowledge, unknown to the jury, that the witness was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995); *People v Williams*, 123 Mich App 752, 756; 333 NW2d 577 (1983).

Furthermore, the prosecutor's remarks regarding the consistency of Hammond's testimony were a proper response to the innuendoes of defense counsel that Hammond was fabricating testimony. *People v Sharbnaw*, 174 Mich App 94, 101; 435 NW2d 772 (1989); *People v Jansson*, 116 Mich App 674, 692; 323 NW2d 508 (1982). While the prosecutor's argument regarding defendant's credibility could be understood as addressing his character, defendant failed to object, and a curative instruction would have been sufficient to cure any prejudice. Further, although the prosecutor improperly asked defendant to comment on the credibility of other witnesses, any prejudice from the question could have been cured with a limiting instruction. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985). The challenged conduct did not result in cumulative error. See *Bahoda, supra* at 292 n 64. Defendant was not denied a fair trial.

Defendant next argues that the trial judge's failure to give sua sponte a cautionary jury instruction on accomplice testimony denied him a fair trial. Because Hammond's testimony was not the only evidence that linked defendant to the offenses, this case was not so "closely drawn" as to have necessitated a sua sponte instruction. *People v Reed*, 453 Mich 685, 691; 556 NW2d 858 (1996); *People v Wilson*, 119 Mich App 606, 620-623; 326 NW2d 576 (1982). Moreover, defense counsel thoroughly explored Hammond's motivation to lie, obviating the need for a sua sponte instruction. *Reed, supra* at 692-693. We also reject defendant's claim that the trial court sua sponte should have given accomplice instructions with regard to the testimony of complainant Catherine McCullough. While McCullough admitted that she participated in assaulting Lawrence White, there was no evidence that she did so willingly. She therefore falls outside the definition of an accomplice. See CJI2d 5.5. See also *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998); *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993).

Defendant also argues that the trial court erred in not instructing the jurors on their obligation to determine individually his guilt or innocence, citing CJI2d 5.5. However, at trial, defendant expressed satisfaction with the instruction given; his failure to object serves as a waiver of any error. *People v Pollick*, 448 Mich 376, 386-388; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984). Even if the claim were not waived, the instruction given would not require reversal. Although the instruction given did not contain the same words as CJI2d 3.11, it was not coercive and, in fact, informed the jurors that none of them was expected to change his or her mind once it was made up. See *Pollick, supra* at 386.

Defendant next contends that the trial court erred in precluding him from testifying that he had consensual sexual relations with McCullough three days after the charged offenses. He argued that the evidence was admissible (1) to impeach McCullough's testimony that she had no involvement with defendant after the incident, and (2) to impeach her testimony that defendant sexually assaulted her. The trial court concluded that defendant's proposed testimony was not relevant because defendant denied that he had sexually assaulted McCullough. That assessment was incorrect under *People v Adair*, 452 Mich 473, 486-488; 550 NW2d 505 (1996).

However, because it is highly probable that the error did not contribute to the verdict, the error was harmless. *People v Mitchell (On Remand)*, 231 Mich App 335, 339; 586 NW2d 119 (1998). The substance of defendant's proffered evidence was suggested in the testimony of prosecution witness

Hammond and defense witness Leonard Person. Hammond testified that subsequent to the offenses alleged in this case, he and defendant went to McCullough's mother's house, where Hammond spent the night with McCullough's sister and defendant spent the night alone with McCullough in her bedroom. Person indicated that shortly after the offense, he and defendant both spent time alone with McCullough in exchange for buying her some crack cocaine. In addition, defense counsel recalled this testimony in his closing argument, stating that "[n]obody denied the contact that Tracy and Catherine McCullough had with each other after this incident, okay? Does that tell you that he coulda raped this lady?" Moreover, in light of the testimony of McCullough and Hammond, the evidence against defendant was overwhelming. On this record, reversal is not required.

Finally, defendant contends that his fifteen-year minimum sentences are disproportionately harsh under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The sentences were toward the lower end of the sentencing guidelines' recommended minimum sentence range and thus are presumed to be proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to overcome that presumption. His status as a "follower," his minimal culpability, and his lack of criminal history are not unusual circumstances that overcome the presumption of proportionality. *People v St John*, 230 Mich App 644, 650; 585 NW2d 849 (1998); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). The trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helen N. White